

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of the Application of	)	
	)	
WIRELESS TELCO	)	FCC File No. 9510603
	)	
Request for Reinstatement <i>Nunc Pro Tunc</i> and/or	)	
Stay of Processing Action	)	

**ORDER**

**Adopted: March 28, 2000**

**Released: March 30, 2000**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* This Order addresses a request filed by Wireless Telco (Wireless) on October 27, 1999,<sup>1</sup> to reinstate *nunc pro tunc* the above-captioned application or, in the alternative, stay the dismissal of the application.<sup>2</sup> For the reasons set forth below, we deny the request.

2. *Background.* On January 29, 1992, an application filed by Bay Area Teleport, Inc. (Bay Area) seeking authorization to operate a multi-channel microwave station on the 38600-40000 MHz (39 GHz) band in the greater San Francisco Bay area was placed on public notice.<sup>3</sup> The cut-off date for competing applications was March 31, 1992. On October 2, 1995, Wireless filed an application seeking authorization to operate a single 39 GHz channel in the San Bruno, California, area on frequencies that had been requested previously by Bay Area.<sup>4</sup> Wireless's application was placed on public notice on October 18, 1995.<sup>5</sup> On November 22, 1995, that portion of Bay Area's application seeking authorization for channels 2A and 2B was dismissed because Bay Area had failed "to demonstrate a compelling need or sufficient justification for more than a single frequency pair."<sup>6</sup>

<sup>1</sup>Letter from Walter H. Sonnenfeldt, counsel for Wireless Telco, to Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (filed Oct. 27, 1999) (Request).

<sup>2</sup>Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, to Wireless Telco (Sept. 27, 1999) (Dismissal Letter).

<sup>3</sup>FCC File No. 9210613. *Public Notice*, Report No. D-628, Common Carrier Bureau Domestic Facilities Applications (rel. Jan. 29, 1992).

<sup>4</sup>FCC File No. 9510603.

<sup>5</sup>*Public Notice*, Report No. 1157 (rel. Oct. 18, 1995).

<sup>6</sup>Letter from Michael B. Hayden, Chief, Microwave Branch, Wireless Telecommunications Bureau, to Alexander Karman, Bay Area Teleport, Inc. (Nov. 22, 1995). On November 13, 1996, the Branch dismissed the remainder of Bay Area's application. See Letter from Gary L. Stanford, Associate Bureau Chief – Operations, Wireless Telecommunications Bureau, to Alexander Karman, Bay Area Teleport, Inc. (Nov. 13, 1996).

3. On December 15, 1995, the Commission suspended the processing of pending mutually exclusive 39 GHz applications and the filing of amendments thereto, pending the outcome of a rulemaking proceeding affecting this service.<sup>7</sup> In a *Report and Order and Second NPRM*, released on November 3, 1997, the Commission stated that it would 1) “dismiss without prejudice all pending mutually exclusive applications, unless the mutual exclusivity was resolved by an amendment of right filed before December 15, 1995,” and 2) “dismiss without prejudice all applications that had not been placed on public notice or completed the 60-day cut-off period as of November 13, 1995.”<sup>8</sup> On July 29, 1999, the Commission affirmed its license processing rules in a *Memorandum Opinion and Order* and reiterated that it would “dismiss all amendments, filed on or after December 15, 1995, including those intended to resolve mutual exclusivity among pending 39 GHz applications.”<sup>9</sup> The Commission further decided to dismiss as unripe “those applications for which the 30-day public notice period was not completed by the November 13, 1995 *Freeze Order*” date.<sup>10</sup>

4. On September 27, 1999, the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch (Branch) dismissed Wireless’s application.<sup>11</sup> The Branch found that Wireless’s application was untimely filed because it conflicted with the Bay Area application, which had established a cut-off period of March 31, 1992.<sup>12</sup> The Branch therefore dismissed the application in accordance with Section 1.934(f) of the Commission’s Rules.<sup>13</sup> On October 27, 1999, Wireless filed a request to reinstate its application or stay its dismissal.<sup>14</sup>

5. *Discussion.* Wireless notes that it has filed an appeal seeking judicial review of the Commission’s 39 GHz orders.<sup>15</sup> It states that one of the issues in that case is the Commission’s treatment of partial mutual exclusivity between applications, especially whether an event such as the dismissal of Bay Area’s application should be deemed to cure any mutual exclusivity.<sup>16</sup> Wireless also questions

---

<sup>7</sup>Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, ET Docket No. 95-183, 11 FCC Rcd 4930, 4988-4989 ¶ 123 (1995) (*NPRM and Order*).

<sup>8</sup>See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18605 ¶ 3 (1997) (*Report and Order and Second NPRM*).

<sup>9</sup>Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, 14 FCC Rcd 12428, 12440-12448 ¶ 37 (1999) (*July 29 MO&O*).

<sup>10</sup>*Id.* at 12450-12452 ¶ 44.

<sup>11</sup>Dismissal Letter at 1.

<sup>12</sup>*Id.* (citing 47 C.F.R. § 101.45(b)).

<sup>13</sup>See 47 C.F.R. § 1.934(f) (providing for dismissal of early- or late-filed applications).

<sup>14</sup>Request.

<sup>15</sup>See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidating Case Nos. 99-1361 and 99-1362) (D.C. Cir. 1999) (consolidating Case Nos. 99-1361 and 99-1362).

<sup>16</sup>Request at 2.

whether the sixty-day cut-off period was properly established in this case.<sup>17</sup> Wireless argues that, regardless of whether the cut-off period had been properly established, given the pendency of an appeal raising issues determinative to the resolution of its application, the application should be reinstated or, in the alternative, the dismissal should be stayed.<sup>18</sup> Wireless contends that granting the requested relief would serve the public interest, convenience and necessity by “eliminating the need for additional duplicative litigation” and helping to “remove uncertainties as to the availability of the subject frequency assignments with respect to the contemplated competitive bidding process.”<sup>19</sup>

6. To receive a stay of an administrative action, a party must show that: 1) it will suffer irreparable harm if the stay is not granted, 2) it is likely to prevail on the merits of its appeal, 3) the grant of a stay will not harm other interested parties, and 4) the grant would serve the public interest.<sup>20</sup> As the Wireless Telecommunications Bureau (Bureau) explained in a recent *Order* denying a motion for stay of dismissals in the 39 GHz band, a vague assertion of irreparable harm is insufficient to justify injunctive relief, as it fails to demonstrate an injury that is “certain and great. . . not theoretical.”<sup>21</sup> We are not persuaded that the types of injuries Wireless mentions are sufficient to warrant a stay. Anticipated economic loss “does not, in and of itself, constitute irreparable harm.”<sup>22</sup> Likewise, Wireless has not demonstrated that the purported harm is irreparable. In this connection, we note that if Wireless were to prevail in its judicial appeal of the Commission’s order regarding the dismissal of the subject application, we anticipate that such relief would address the ultimate disposition of the application.<sup>23</sup> Therefore, we find that Wireless has not shown any injury warranting a stay.<sup>24</sup>

7. In addition, we find Wireless’s alternate request that we reinstate its applications until the judicial appeal is resolved effectively to be a restatement of its request for a stay, so we deny that request, as well. Moreover, reinstating Wireless’s applications would frustrate the goals underlying this proceeding and “could lead to results inconsistent with our intent . . . to update the regulatory structure of the 39 GHz band in light of contemporary market conditions.”<sup>25</sup> Further, we believe that the Bureau addressed this matter in its November 23, 1999, decision.

---

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 3.

<sup>20</sup>See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958) (*Virginia Petroleum*), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>21</sup>Amendment of the Commission’s Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands, *Order*, ET Docket No. 95-183, RM-8553, DA 99-2632, ¶ 2 (WTB rel. Nov. 23, 1999) (citation omitted).

<sup>22</sup>*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*); see also *Virginia Petroleum*, 259 F.2d at 925 (“mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough”).

<sup>23</sup>See 47 U.S.C. § 402(h).

<sup>24</sup>Where, as here, petitioner fails to show that it will suffer irreparable harm in the absence of injunctive relief, we need not consider the other requirements for a stay. *Wisconsin Gas*, 758 F.2d at 674.

<sup>25</sup>*July 29 MO&O*, 14 FCC Rcd at 12437-38; *Report and Order and Second NPRM*, 12 FCC Rcd at 2917 ¶ 15; *NPRM and Order*, 11 FCC Rcd at 4988-89 ¶¶ 121-124.

8. Accordingly, IT IS ORDERED that, pursuant to Sections 154(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.41 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.106, the Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Action filed on October 27, 1999, by Wireless Telco IS DENIED.

9. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau